Christopher Martin Boyd v Deb Brata Das Gupta

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R2–24–25 OF 1996
AZMEL J
17 DECEMBER 1997

Arbitration *— Procedure — Application for order of discovery against third party — Whether application ought to be allowed — Arbitration Act 1952 s 13(1)*

The defendant had applied to the arbitrator to issue an order of discovery against the plaintiff to produce documents which belonged to MUI Properties Sdn Bhd of which the plaintiff was the Managing Director. The arbitrator disallowed the application, hence this application to the High Court.

Held, dismissing the application:

(1) The plaintiff, though designated as the Managing Director of MUI Properties Sdn Bhd, was only an employee of the said company. In that capacity, the documents of MUI Properties Sdn Bhd do not belong to him. Any release of documents from the company must be with the approval of the Board of Directors and/or the shareholders of the company. Section 13(1) of the Arbitration Act 1952 only allows documents that are within the possession or power of the parties to the arbitration to be ordered to be produced by the arbitrator. Since MUI Properties Sdn Bhd is not a party to this arbitration, the arbitrator was quite correct in refusing the request to order documents belonging to MUI Properties Sdn Bhd to be produced for the hearing of this dispute between the parties (see p 283H).

(2) The dispute arose between the plaintiff and the defendant in their individual capacities. Therefore, MUI Properties Sdn Bhd is a third party and not in any way connected to the dispute. The arbitrator was correct in concluding that he had no jurisdiction to give any order to any third party not involved in the dispute (see pp 283I and 284A).

Furthermore, an arbitrator only has limited jurisdiction and has to act within the powers that he is given by the parties and by the provision of the Arbitration Act 1952. If he exceeds such authority, it would certainly make his award erroneous for want of jurisdiction (see p 284B).

[Bahasa Malaysia summary

Defendan telah memohon kepada penimbangtara untuk mengeluarkan perintah penzahiran terhadap plaintif untuk mengemukakan dokumen-dokumen kepunyaan MUI Properties Sdn Bhd di mana plaintif adalah Pengarah Urusan. Penimbangtara menolak permohonan, oleh itu permohonan ini ke Mahkamah Tinggi.

Diputuskan, menolak permohonan:

(1) Plaintif, walaupun dilantik sebagai Pengarah Urusan MUI Properties Sdn Bhd, hanyalah seorang pekerja syarikat tersebut. Dalam keupayaan itu, dokumen-dokumen MUI Properties Sdn Bhd bukan kepunyaannya. Apa-apa pelepasan dokumen daripada syarikat itu mestilah dengan kelulusan Lembaga Pengarah dan/atau pemegang saham syarikat. Seksyen 13(1) Akta Timbangtara 1952 hanya membenarkan dokumen-dokumen dalam pemilikan atau kuasa pihak-pihak kepada timbangtara untuk diperintahkan dikemukakan oleh penimbangtara. Oleh kerana MUI Properties Sdn Bhd bukan pihak kepada timbangtara ini, penimbangtara adalah betul dalam menolak permintaan untuk memerintahkan dokumen-dokumen kepunyaan MUI Properties Sdn Bhd untuk dikemukakan bagi pembicaraan pertikaian antara pihak-pihak (lihat ms 283H).

(2) Pertikaian timbul di antara plaintif dan defendan dalam keupayaan individu mereka. Oleh itu, MUI Properties Sdn Bhd adalah pihak ketiga dan tidak dalam apa cara sekalipun berkait dengan pertikaian itu. Penimbangtara adalah betul dalam menyimpulkan bahawa beliau tidak mempunyai bidang kuasa untuk membuat apa-apa perintah terhadap pihak ketiga yang tidak terlibat dalam pertikaian itu (lihat ms 283I dan 284A).

Tambahan pula, penimbangtara hanya mempunyai bidang kuasa terhad dan mesti bertindak dalam kuasa yang diberikan kepadanya oleh pihak-pihak dan oleh peruntukan Akta Timbangtara 1952. Jika beliau melampaui kuasa itu, award yang diberikannya pastilah silap kerana ketiadaan bidang kuasa (lihat ms 284B).]

Notes

For cases on procedure in arbitration proceedings, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 783–805.

Legislation referred to

Arbitration Act 1952 s 13(1), (6)(B)

Azmel J: In the course of hearing the dispute between the plaintiff and the defendant, the defendant had applied to the arbitrator for documents to be produced by the MUI Group of Companies. The plaintiff raised an objection to the application and as such the arbitrator heard arguments from counsel of both parties on the application. At the end of it, the arbitrator in his interim award, ruled as follows —

(a) the arbitrator's power for ordering discovery is only in respect of the parties to the arbitration. The request is for documents in the control, power and possession of a third party and hence the arbitrator cannot order discovery of these documents; and

A (b) the jurisdiction conferred on the arbitrator by the parties and the Arbitration Act 1952 is restricted only to the parties to the reference. The arbitrator has no jurisdiction to request third party to produce documents — that power being that of the High Court only.

The defendant, being dissatisfied with the interim award of the arbitration B applied to this court by way of special case stated on the following questions for decisions —

(1) Whether the arbitrator has the power to order discovery of documents under s 13(6)(B) of the Arbitration Act 1952 in a pending arbitration.

(2) If the first question is answered in the affirmative, whether the C arbitrator can order discovery of documents in respect of a party in his role as a Managing Director of a company if such discovery is relevant to the proceedings.

(3) If the second question is answered in the affirmative, whether documents relating to transactions of the company which are within D the knowledge of the party who is the Managing Director of the company are open to an order of discovery by the arbitrator if such discovery is relevant to the proceedings.

(4) If the third question is answered in the affirmative, whether the arbitrator can order discovery of documents in respect of transactions E carried out by controlled subsidiaries of the company in which the Managing Director is the party concerned if such discovery is relevant to the proceedings.

The gist of the defendant's application though enumerated in four separate matters was in reality asking the arbitrator to issue an order of discovery F against the plaintiff to produce documents which belonged to MUI Properties Sdn Bhd of which the plaintiff was the Managing Director. After having considered the matter, I decided to dismiss the application by the defendant with cost as I agree entirely with the ruling of the arbitrator. It was for that reason that my oral decision at the conclusion of the hearing of this application was 'Permohonan ditolak dengan kos' without the real G necessity of giving an answer to each of the four questions posed.

In the first place, the documents sought to be produced belonged to MUI Properties Sdn Bhd. The plaintiff, though designated as the Managing Director of MUI Properties Sdn Bhd, was only an employee of the said company. In that capacity, the documents of MUI Properties Sdn Bhd do H not belong to him. Any release of documents from the company must be with the approval of the Board of Directors and/or the shareholders of the company. Section 13(1) of the Arbitration Act 1952 only allows documents that are within the possession or power of the parties to the arbitration to be ordered to be produced by the arbitrator. MUI Properties Sdn Bhd is not a party to this arbitration. As such, the arbitrator was quite correct in I refusing the request to order documents belonging to MUI Properties Sdn Bhd to be produced for the hearing of this dispute between the parties.

In the second place, the dispute arose between the plaintiff and the defendant in their individual capacities as partners of the firm Gupta Boyd

& Co. MUI Properties Sdn Bhd is a third party and not in any way connected to the dispute. I fully agree with the decision of the arbitrator in arriving at the conclusion that he had no jurisdiction to give any order to any third party not involved in the dispute.

In the third place, an arbitrator only has limited jurisdiction, unlike the High Court who has unlimited jurisdiction. The arbitrator has to act within the powers that he is given by the parties and by the provision of the Arbitration Act 1952. If he exceeds such authority, it would certainly make his award erroneous for want of jurisdiction. On hind side, I was quite right in appointing a person with legal qualification and experience to be the arbitrator instead of appointing an accountant. As anticipated, many legal issues would be raised in the course of the proceedings. And certainly this is one of them. I now find that this arbitrator, En Wilfred Abraham, an experienced lawyer, has the ability and capability to decide matter pertaining to legal issues in course of conducting the arbitration. I also find that he had decided the issue regarding the defendant's application correctly.

Having considered the circumstances of this case, I dismissed the application by the defendant with costs.

Application dismissed with costs.

Reported by Loo Lai Mee